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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 BENJIMEN D. ROGRIGUEZ,

12 Petitioner,

13 v.

14 HERNANDEZ, Warden,

15 Respondent.  
16

Civil No. 07cv2151-DMS (CAB)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

17 Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas  
18 Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to  
19 move to proceed in forma pauperis. In addition, Petitioner has failed to allege exhaustion of  
20 state court remedies with respect to any claim in the Petition.

21 Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or  
22 qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See  
23 Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit,  
24 **no later than January 14, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof  
25 of his inability to pay the fee.

26 Further, habeas petitioners who wish to challenge either their state court conviction or the  
27 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
28 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial

1 remedies, a California state prisoner must present the California Supreme Court with a fair  
2 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
3 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court  
4 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
5 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
6 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
7 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
8 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
9 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
10 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
11 in federal court, but in state court.” Id. at 366 (emphasis added).

12 Here, Petitioner has not indicated that he has exhausted state judicial remedies with  
13 respect to claims one and two, and has specifically stated that he has not presented claims three  
14 and four to the California Supreme Court. (See Pet. at 6-9.) If Petitioner has raised his claims  
15 in the California Supreme Court he must so specify. The burden of pleading that a claim has  
16 been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.  
17 1981).

18 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
19 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
20 of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
21 limitation period shall run from the latest of:

22 (A) the date on which the judgment became final by the  
23 conclusion of direct review or the expiration of the time for seeking  
such review;

24 (B) the date on which the impediment to filing an application  
25 created by State action in violation of the Constitution or laws of the  
United States is removed, if the applicant was prevented from filing  
26 by such State action;

27 (C) the date on which the constitutional right asserted was  
initially recognized by the Supreme Court, if the right has been  
28 newly recognized by the Supreme Court and made retroactively  
applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104 (2000). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not alleged exhaustion of state court remedies.

### CONCLUSION

Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed to satisfy the filing fee requirement and has failed to allege exhaustion of state judicial remedies. To have this case reopened, Petitioner must satisfy the filing fee requirement **and** file a First Amended Petition no later than **January 14, 2008** that cures the pleading deficiencies set forth above. Further, Petitioner is advised that if he has not alleged exhaustion of his state court remedies before **January 14, 2008**, and he still wishes to pursue his claims in this Court, he will have to start over by filing a completely new habeas petition in

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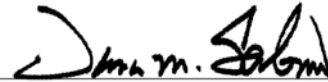
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1 this Court. See In re Turner, 101 F.3d 1323 (9th Cir. 1997). The Clerk of Court shall send a  
2 blank Southern District of California In Forma Pauperis Application and a blank Southern  
3 District of California amended petition form to Petitioner along with a copy of this Order.

4 **IT IS SO ORDERED.**

5 DATED: November 15, 2007

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8 HON. DANA M. SABRAW  
9 United States District Judge

10 CC: ALL PARTIES  
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